IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 25TH NOVEMBER 2010 / 4TH AGRAHAYANA 1932

AS.No. 764 of 1996(A)

[OS.NO.48/1994 OF ADDL.SUB COURT, KOCHI]

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APPELLANT/PLAINTIFF:

R.DHARMAPERUMAL, AGED 58 YRS,
S/O. RAMASWAMY, RESIDING AT C.C. 10/1078,
THIRUVALLUVUR STREET, VELI, FORT KOCHI VILLAGE,
KOCHI TALUK.

BY ADVS. SRI.ELDO PAUL,
SRI.MOHAN I ABRAHAM,
SRI.M.P.RAMNATH.

RESPONDENTS/DEFENDANTS:

***1. R. KANAKAVEL, AGED 71 S/O. RAMASWAMY, RESIDING AT 10/1078, THIRUVALLUVUR STREET, VELI, FORT KOCHI VILLAGE, KOCHI TALUK. (DIED).**

****2. R. MARIYAMMAL, AGED 73, D/O. DO. DO. DO.**

3. R. SARASWATHY, AGED 66, D/O. DO. DO.

4. R. VELAMBAL, AGED 51, D/O. DO. DO.

<u>*ADDITIONAL RESPONDENTS 5 TO 7 IMPLEDED:</u>

5. SUSEELA, AGED AGED ABOUT 69 YEARS, W/O. LATE R. KANAKAVEL, HOUSEWIFE, OLD NO.CC.10/1078, THIRUVALLUVAR STREET, (OLD D.B. STREET), VELI, SOUTH AMARAVATHI, FORT KOCHI VILLAGE, KOCHI TALUK.

6. GAYATHRI, AGED ABOUT 38 YEARS, D/O. LATE R. KANAKAVEL, HOUSEWIFE, OLD NO.C.C.10/1078, THIRUVALLUVAR STREET (OLD D.B. STREET), VELI, SOUTH AMARAVATHI, FORT KOCHI VILLAGE, KOCHI TALUK.

**7. RAGHURAM, AGED ABOUT 37 YEARS,
S/O. LATE R. KANAKAVEL, OLD. NO. C.C. 10/1078,
THIRUVALLUVAR STREET (OLD D.B. STREET),
VELI, SOUTH AMARAVATHI, FORT KOCHI VILLAGE,
KOCHI TALUK.**

***LEGAL HEIRS OF DECEASED 1ST RESPONDENT ARE IMPLEADED AS ADDL. RESPONDENTS 5 TO 7 VIDE ORDER DATED 19/11/10 ON I.A. NO.1796/10.**

****ADDL. RESPONDENTS 8 TO 13 IMPLEADED:**

**8. AMBIKAVATHY, D/O. MARIYAMMAL,
AGED 58 YEARS, HOUSEWIFE,
KARTHIKA BHAWAN, KOTTAMUKKU NEAR AYYAPPA COLONY,
KOLLAM.**

**9. KASTHURI, D/O. MARIYAMMAL, AGED 56 YEARS,
HOUSEWIFE, KARTHIKA BHAWAN, KOTTAMUKKU,
NEAR AYYAPPA COLONY, KOLLAM.**

**10. VALSALA, D/O. MARIYAMMAL, AGED 55 YEARS,
HOUSEWIFE, NOW RESIDING AT MULLASSERY THEKKETHIL,
POLAYATHODU, KOLLAM.**

**11. VIJAYAKUMARI, D/O. MARIYAMMAL,
AGED 50 YEARS, HOUSEWIFE,
KONNELAZHIKAM, MUNDAKKEL POST,
KOLLAM.**

**12. SHANKARANKUTTY, S/O. MARIYAMMAL, AGED 57 YEARS,
TEA STALL, "SUMI BHAVAN", POLLICHIRA,
VAYALUVEEDU, SASTHRI JUNCTION, KOLLAM.**

**13. VISWANATHAN @ BABY, S/O. MARIYAMMAL,
AGED 53 YEARS, RETIRED EMPLOYEE,
"SOWBAGHYA", GANAPATHY NAGAR, NO.65 BEACH AREA,
KOLLAM – 691 001.**

****LR'S OF DECEASED R2 ARE IMPLEADED AS ADDL. RESPONDENTS 8 TO 13 VIDE ORDER DTD. 19/11/2010 ON I.A. 1798/2010.**

**BY ADVS. SRI.SUNIL THOMAS,
SRI.P.F.THOMAS.**

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 25/11/2010,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

prv.

M.N. KRISHNAN, J.

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A.S.NO. 764 OF 1996

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Dated this the 25st day of November, 2010.

J U D G M E N T

This appeal is preferred against the judgment and decree passed by the Subordinate Judge, Kochi in O.S.48/94. The suit is one for partition. It is the case of the plaintiff that the property originally belonged to his father Ramaswamy by virtue of a partition in his family and thereafter on the death of Ramaswamy it had devolved equally upon the children and wife and one of the sons, namely Somasundaram, died in 1993 and the mother died in 1970. So the remaining heirs are the plaintiff and defendants 1 to 4. Therefore the plaintiff is seeking partition of the property into 5 equal shares and to allot one out of five shares to him.

2. The first defendant is the contesting

defendant. He would contend that the plaintiff and defendants 2 to 4 had lost their right by ouster. According to him he had made improvements in the property even in 1963 and after 1972 he had been holding the property exclusively and the building tax etc. are paid by them and that the plaintiff is residing at Agaly and the daughters are residing in the place of their husbands and therefore even if there is any right for them it is barred by ouster. It is also contended by him that he had made certain construction in the property including a latrine and kitchen and also a separate building which he had mortgaged and raised money. Therefore he prays for dismissal of the suit.

3. In the trial court Exts.A1 to A4 and B1 to B19 were marked and PW1 and DWs.1 and 2 were examined. The trial court held that the right of

the plaintiff and defendants 2 to 4 are lost by ouster and therefore dismissed the suit. It is against the dismissal of the said suit the plaintiff has preferred the appeal. During the pendency of the appeal respondents 1 and 2 in the appeal died and the legal representatives of the deceased first respondent are impleaded as respondents 5 to 7 and that of the 2nd respondent as R8 to R13. Unfortunately there is no representation for any of these respondents.

4. The point that arises for determination in the appeal is mainly on the question of ouster and in case of availability for division I find from the pleadings the shares also will vary. So let me first consider regarding the partibility of the property. Whatever it may be, the plaintiff and defendants have right over the property unless it is proved it is barred by

ouster. Now the trial court on the basis of the materials found that the first defendant had taken permission from the Corporation for making improvements of the building and that the Corporation has assessed the tax in his name and further that he had paid the building tax and basic tax for the property and came to the conclusion that the right of the plaintiff and other defendants are lost by ouster.

5. Now, the law of adverse possession is undergoing very serious change and even the Hon'ble Supreme Court has suggested that the time has come now to take it away from the statute. It is a right of a person that is attempted to be taken away on the happening of certain event. So far as a partition suit is concerned the following are rudimentary.

6. It is a settled principle of law that all

members cannot hold the property together. One person may hold the property to the benefit of the others. That is why it is always held that possession of a co-owner is on behalf of the other co-owners and it will enure to the benefit of other co-owners.

7. Now the classical requirements are really dealt with in the decision reported in ***Krishnan v. Raman (1986 KLT SN 104 page 63).*** The learned judge had held that as follows:

> "The possession of one or some of the co-owners is considered by law always to be on behalf and as representatives of the other co-owners also. The legal position of the co-sharer in possible would be that of a constructive trusted on behalf of the co-sharers not in possession. Law deems that their rights would be protected by the trustees. Mere non-participation

in rents and profits will not amount to ouster so as t give title by adverse possession. That does not mean that there cannot be adverse possession as between co-owners or their transferees. A trustee cannot b setting up his own title acquire by adverse possession title to the property until he renounces his possession and re-enters the property claiming a hostile title. Such renouncement and re-entry with a claim of hostile title are matters for inference from given facts in individual cases. The classical requirement of adverse possession is that it should be nec vi nec claim nec precario. Possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the rival claimant. Ouster must be made

> out. The co-owner in possession cannot render his possession adverse to the other co-owner or c-owners not in possession merely by entertaining secret hostility. There must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one or some of them to the knowledge of the others so as to constitute ouster."

8. It is with these principles the matter has to be looked into. Now the father of the plaintiff and the defendants died in the year 1950. The mother died in the year 1970. One of the brother namely Somasundaram died in the year 1993. There was a fight between the brothers and Somasundaram had moved a criminal case before the concerned Magistrate's Court. In 1971 it was settled between the parties whereby portions of the building, i.e, one room each were agreed to

be occupied by each of the sharers. So till 1971 there is an absolute understanding between the parties as to the ownership of the property as co-owners. Now after executing Ext.A1 just because one of the co-owners did not stay there that does not mean that his right is lost. As stated in the above said decision there must be a re-entry into the property with the hostile animus. I had meticulously gone through the pleadings in this case. Really the plea regarding the hostile title is not there. What is stated is that he had been given in possession of the property for a long number of years and therefore the right of the plaintiff and other defendants are lost by adverse possession, i.e. ouster. Till 1971 the plea of jointness remains. Just because one of the brothers had gone to Agaly in connection with his job or the daughters

have been given in marriage or staying along with their husbands their right in the family property cannot be lost by the mere act of their non presence in the locality. It is always natural that when one co-owner occupies the property he used to make certain improvements in the property for the purpose of his convenient stay. Similarly, it is the person normally who is in possession will pay tax and receipts. Even the authorities thinking a particular person permanently available in the locality might have issued notice of assessment against that person. All these do not constitute the ingredient of hostile animus which is absolutely necessary to sustain the plea of ouster. It is true that there were cases as seen from 1967 KLT onwards where there was uninterrupted possession of a person over the properties with the knowledge of

the true owner and the inference of claiming adverse possession was found to be sufficient to constitute ouster and adverse possession. But what is available here is that the first defendant himself has admitted the right of the brothers, an agreement is entered into, they had decided to occupy one room each and thereafter immediately on the next year onwards he sets up a case of adverse possession in the written statement. I am afraid that the mere payment of tax or making some improvements in the property will not be a denial of the right of co-owner and therefore I hold that the finding of the trial court that the right of the plaintiff and other defendants are lost by ouster is not sustainable in law and therefore it is set aside and hold that the property is liable to be divided.

9. Now the next question is regarding the correctness of the shares over the property. It is true that in the plaint what is claimed is one out of five shares each and in the written statement by the first defendant the plea is that of ouster but it has to be understood that the Court has got the duty to allot shares only in accordance with law. The parties are Hindus governed by Mithakshara Law. The father died in the year 1950. Father got the property by virtue of a partition deed means, that it is an ancestral property. Under Hindu Law when a male child is born, the son is entitled to right by birth because he became a member of the co-parcenery. Thus when the three sons are born and the father is there all of them will be entitled to get one out of four shares each. Then on the date of death of the father he had one out of

four shares. Since the death had taken place in the year 1950 daughters are not entitled to get shares under the provisions of the pristine Hindu Law. The mother will get a right under the provisions of the Hindu Woman Right to Protection Act. A limited interest which has matured into an absolute interest by virtue of the provisions of the Hindu Succession Act of 1956. So devolution of shares so far as the property of the father is concerned would have been, each son will be entitled to one out of four plus one out of sixteen, i.e. 5/16 each and the mother 1/16. Then one of the sons of the father namely Somasundaram and the mother died. Somasundaram did not have any wife or children and the mother at the time of her death only had these five children. These 5/16 plus 1/16 shares namely 6/16 shares had to devolve upon the plaintiff and

defendants 1 to 4 equally. So in other words when the property is divided into 80 equal shares being the sons, the plaintiff and the first defendant will be entitled to 31/80 shares each and defendants 2 to 4 each entitled to 6/80 shares each. Since defendants 1 and 2 had died the share of D1 will devolve upon R5 to R7 in the appeal and the share of D2 will devolve upon R8 to R13. The issue is answered accordingly.

10. Now the question is regarding the reservation and equities. As stated by me earlier any improvements made in the property without the consent of the co-owners may not entitle the person to get reservation regarding them but it has always been held that the law of equity views that with a favour and therefore I leave the question of equity be decided in the final decree proceedings. I make it very clear

that the reservation is not possible.

11. In the result, the judgment and decree of the trial court are set aside and a preliminary decree for partition is passed as follows.

(1) The plaint schedule property be divided into 80 equal shares and allot 31/80 shares to the share of the plaintiff, 31/80 shares to the share of respondents 5 to 7 in the appeal and 6/80 shares to respondents 8 to 13 and 6/80 shares each to defendants 3 and 4. Share of the defendants shall be allotted only on payment of Court fee.

(2) Nobody is entitled to any reservation and the question of equity be decided in the final decree proceedings after the Commissioner inspects the property.

(3) Cost of the suit as well as the appeal shall come out of the estate.

(4) Parties are at liberty to apply for final decree.

M.N. Krishnan, Judge.

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M.N. KRISHNAN, J.

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A.S. NO. 764 OF 1996

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J U D G M E N T

25th November, 2010.